

SCOTT N. SCHOOLS (SC 9990)
 United States Attorney
 JOANN M. SWANSON (CSBN 88143)
 Chief, Civil Division
 MELANIE L. PROCTOR (CSBN 228971)
 Melanie.Proctor@usdoj.gov
 Assistant United States Attorney

 450 Golden Gate Avenue, Box 36055
 San Francisco, California 94102-3495
 Telephone: (415) 436-6730
 FAX: (415) 436-7169

Attorneys for Defendants

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

PADAM GIRI,)	No. C 07-5219 JCS
)	
Plaintiff)	
)	
v.)	
)	MOTION TO DISMISS
ROBERT MUELLER, III, Director, Federal)	
Bureau of Investigation; EMILIO)	Date: February 8, 2008
GONZALES, Director, U.S. Citizenship and)	Time: 9:30 a.m.
Immigration Services; MICHAEL)	Court: A
CHERTOFF, Secretary, Department of)	
Homeland Security; MICHAEL B.)	
MUKASEY,* Attorney General,)	
Department of Justice; TERRY RICE, San)	
Francisco Field Office Director, USCIS;)	
EMILIA BARDINI, Director, Asylum)	
Office, San Francisco,)	
)	
Defendants.)	

I. NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on February 8, 2008, at 9:30 a.m., before the Honorable Joseph C. Spero, Courtroom No. A, 450 Golden Gate Avenue, San Francisco, California, 94102, Defendants Robert Mueller, et al., by their attorneys, Scott N. Schools, United States Attorney for the Northern District of California, and Melanie L. Proctor, Assistant U.S. Attorney, will move this

*Pursuant to Fed. R. Civ. P. 25(d)(1), Michael B. Mukasey is substituted for his predecessor, Alberto Gonzales, as the United States Attorney General.

1 Court for an order dismissing the Complaint. Defendants' Motion is based on this notice, the points
 2 and authorities in support of this motion, the pleadings on file in this matter, and on such oral
 3 argument as the Court may permit.

4 II. INTRODUCTION

5 Plaintiff asks the Court to compel Defendants to adjudicate his application for asylum.
 6 However, Congress has explicitly forbidden such legal actions. In addition, Defendants Mueller and
 7 Mukasey are not properly named in this action. Accordingly, the Complaint should be dismissed
 8 for lack of subject matter jurisdiction.

9 III. GENERAL PRINCIPLES APPLICABLE TO THIS MOTION

10 A. LEGAL STANDARD

11 "When a defendant moves to dismiss a complaint for lack of subject matter jurisdiction
 12 pursuant to Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of proving that the court has
 13 jurisdiction to decide the claim." R.K., ex rel. T.K. v. Hayward United School Dist., 2007 WL
 14 2778702, at *4 (N.D. Cal. Sept. 21, 2007), citing Thornhill Publ'n Co. v. General Tel. & Elecs.
 15 Corp., 594 F.2d 730, 733 (9th Cir. 1979). A motion to dismiss for lack of subject matter jurisdiction
 16 may take two forms: facial or factual. R.K., 2007 WL 2778702, at *4 citing Safe Air for Everyone
 17 v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). When the jurisdictional attack is "facial," the Court
 18 accepts the factual allegations of the complaint as true, and construes those facts in the light most
 19 favorable to the non-moving party. R.K., 2007 WL 2778702, at *4. If the attack is "factual," the
 20 Court may consider "affidavits or other evidence that would be properly before the Court, and the
 21 non-moving party is not entitled to any presumptions of truthfulness with respect to the allegations
 22 in the complaint." Id.

23 B. RELIEF AVAILABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT 24 AND THE MANDAMUS ACT

25 Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, et seq., a court may
 26 compel "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The
 27 elements of a claim under § 706(1) are the existence of a discrete, ministerial duty; a delay in
 28 carrying out that duty; and a determination that the delay was unlawful or unreasonable in light of

prejudice to one of the parties. Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004); Rockbridge v. Lincoln, 449 F.2d 567, 569-73 (9th Cir. 1971).

The Administrative Procedure Act, 5 U.S.C. § 701 (“APA”), et seq., does not provide an independent jurisdictional basis. Califano v. Sanders, 430 U.S. 99, 107 (1977); Staacke v. U.S. Department of Labor, 841 F.2d 278, 282 (9th Cir. 1988). Rather, it merely provides the standards for reviewing agency action once jurisdiction is otherwise established. Staacke, 841 F.2d at 282. Similarly, the Declaratory Judgment Act, 28 U.S.C. § 2201 (“DJA”), does not provide an independent basis for jurisdiction; rather, it only expands the range of remedies available in federal courts. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950).

Mandamus is an extraordinary remedy. See Cheney v. United States District Court for the District of Columbia, 542 U.S. 367, 392 (2004) (Stevens, J., concurring); Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980). The United States Supreme Court has stated that “[t]he common law writ of mandamus is intended to provide a remedy for a plaintiff only if . . . the defendant owes him a clear nondiscretionary duty.” Heckler v. Ringer, 466 U.S. 602, 616 (1984).

The Ninth Circuit has explained that

[m]andamus . . . is available to compel a federal official to perform a duty only if: (1) the individual’s claim is clear and certain; (2) the official’s duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available.

Kildare v. Saenz, 325 F.3d 1078, 1084 (9th Cir. 2003).

C. ASYLUM BENEFITS

Under 8 U.S.C. § 1158, an alien physically present in the United States, or who arrives in the United States, may apply for asylum. 8 U.S.C. § 1158; 8 C.F.R. § 208.1-14. Generally, the application is filed with the service center which services the asylum office with jurisdiction over the applicant’s residence; however some applications may be filed directly with the asylum office. 8 C.F.R. § 208.4(b). While the application is pending, the applicant may receive authorization to be employed in the United States. 8 C.F.R. § 208.7. Asylum applicants are interviewed under oath by an asylum officer. 8 C.F.R. § 208.9. In the case of an alien who does not otherwise have lawful status in the United States, if the asylum officer does not grant asylum, she or he will refer the

1 application to the immigration judge for adjudication. 8 C.F.R. § 208.14(c)(1).

2 IV. ANALYSIS

3 A. THE COURT LACKS SUBJECT MATTER JURISDICTION

4 Plaintiff asserts that under 8 U.S.C. § 1158(d)(5)(A)(iii), he has a right to have his
5 application decided within 180 days after the date he filed his application. Complaint, p. 6 ¶ 40.
6 However, Plaintiff ignores the sentence that appears just two subsections later:

7 Nothing in this subsection shall be construed to create any substantive or procedural
8 right or benefit that is legally enforceable by any party against the United States or
its agencies or officers or any other person.

9 8 U.S.C. § 1158(d)(7). Mandamus relief is only available where the plaintiff establishes a clear and
10 certain claim, and the existence of a nondiscretionary duty that is free from doubt. Kildare v. Saenz,
11 325 F.3d at 1084.

12 Moreover, the United States, as sovereign, can be sued only to the extent that it has
13 consented to be sued. United States v. Sherwood, 312 U.S. 584, 586 (1941); Gilbert v. DaGrossa,
14 756 F.2d 1455, 1458 (9th Cir. 1985). Here, Congress has explicitly proscribed against Plaintiff's
15 action. 8 U.S.C. § 1158(d)(7). Accordingly, the Court lacks subject matter jurisdiction, and the
16 Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). Vang v. Gonzales, 237 Fed.
17 Appx. 24, 31 (6th Cir. 2007) (holding a fourteen year delay in processing petitioners' asylum
18 applications did not deny them due process rights, taking note of § 1158(d)(7)); Gjeluci v. Chertoff,
19 2005 WL 1801989, at *1 (E.D. Mich. July 27, 2005) (finding that § 1158(d)(7) expressly precludes
20 a finding that a clear nondiscretionary duty exists).

21 B. DEFENDANTS MUELLER AND MUKASEY ARE NOT PROPERLY NAMED

22 Plaintiff alleges that Defendant Mueller is sued in his official capacity, because "he is
23 responsible for conducting both criminal background checks and the National Name Check
24 Program." Complaint, p. 2 ¶ 7. However, Plaintiff fails to allege any facts that support a claim
25 against him. Complaint, pp. 4-5 ¶¶ 18-37. Similarly, Plaintiff alleges that the Attorney General¹ is

27 ¹Plaintiff names Paul Clement as the Acting Attorney General ; however, the Acting
28 Attorney General was Peter D. Keisler. Regardless, pursuant to Fed. R. Civ. P. 25(d)(1), Michael
B. Mukasey is substituted for his predecessor as the United States Attorney General.

1 sued in his official capacity, because “he is charged with the administration and enforcement of the
2 immigration law, including security checks required to obtain an immigration benefit such as
3 asylum.” Complaint, p. 3 ¶ 11. The statute on which Plaintiff relies provides that the Secretary of
4 the Department of Homeland Security is charged with the administration and enforcement of
5 immigration law. 8 U.S.C. § 1103(a). Moreover, as with Defendant Mueller, Plaintiff fails to state
6 a claim against Defendant Mukasey. Complaint, pp. 4-5 ¶¶ 18-37.

7 Since March 1, 2003, the Department of Homeland Security (“DHS”) has been the agency
8 responsible for implementing the Immigration and Nationality Act. See 6 U.S.C. §§ 271(b)(5), 557.
9 Thus, the only relevant Defendants here are those within the DHS, and Defendants Michael B.
10 Mukasey and Robert S. Mueller should be dismissed. See Clayton v. Chertoff, et al., No. 07-cv-
11 02781-CW, slip. op., at 4-7 (N.D. Cal. Oct. 1, 2007); Konchitsky v. Chertoff, No. C-07-00294
12 RMW, 2007 WL 2070325, at *6-7 (N.D. Cal. July 13, 2007); Dmitriev v. Chertoff, No. C 06-7677
13 JW, 2007 WL 1319533, at *4 (N.D. Cal. May 4, 2007).

14 V. CONCLUSION

15 For the foregoing reasons, Defendants respectfully request the Court to dismiss the
16 Complaint.

17 Dated: December 21, 2007

Respectfully submitted,

18 SCOTT N. SCHOOLS
19 United States Attorney

20 /s/
21 MELANIE L. PROCTOR
22 Assistant U.S. Attorney
23
24
25
26
27
28